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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 225

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

v.

MARCELLA DRIGGERS, AS ADMINISTRATRIX OF WILLIAM A. DRIGGERS, DECEASED, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This action was brought to recover for the death of plaintiff's intestate, William A. Driggers, employed by petitioner at Charleston, South Carolina, as a brakeman in a switching crew, who was killed when he obeyed a signal given him by his conductor and stepped from the front running board of his own engine, while it was slowly traveling south on the main line track, and alighted between his engine and the southbound main line track running parallel with it, when he was

struck by a southbound train coming from behind at a high and excessive rate of speed in the yard limits, and at a greater rate of speed than that permitted by the rules of the railroad company, without giving any signal of its approach when it was near enough for him to hear it; this occurring, not as the petitioner erroneously sets out in the opening of its statement of facts, at a place where Driggers had a clear view of the approaching engine for two thousand feet for a distance of one hundred feet or more before reaching the main line, but, on the contrary, *at a place where Driggers, in the discharge of his duty, was traveling and had for some distance been traveling on the front running board of an engine headed south and southwest, away from the direction from which the passenger train was coming, with his attention fixed upon his conductor who was standing some distance away to the southwest, giving him signals, and with his view of the train or any other object approaching from the north completely obstructed by the body and cab of the engine on which he was riding.*

We believe it is especially important to bear in mind the position of Driggers on the front running board of his engine, the direction in which his engine was traveling, and the position of the conductor, who was on the ground signaling to Driggers from a point toward which he was traveling. We respectfully submit that a careful consideration of these facts together with the plan of the tracks and the adjacent topography will reveal that plaintiff's intestate was not in a posi-

tion to see the approach of the train which struck him for the entire time during which his engine was traversing the southwestward curve into the main line track; first, because of the interposition of billboards and shrubbery, and, next, because of his position on the engine and the direction in which it was traveling after it had passed these obstructions; and, in addition to his inability to see the approaching train, that *his duty required him* to keep his eyes turned upon his conductor in a direction opposite to that from which the train that struck him was coming, so that when petitioner emphasizes throughout its brief the fact that Driggers did not see the approaching train, the true explanation is that Driggers, from his position and the direction of his engine, *could not* see the approaching train; and that, in addition to these facts, his duty at the time required him to look in an opposite direction.

Conductor McDonald testified that as the Driggers engine reached the main track, Driggers was on the right-hand front footboard facing south (R., 30), and that Driggers could not see the train coming from the north (R., 41).

In detail, the circumstances surrounding Driggers' death were as follows:

In the locality where Driggers was killed Meeting Street road runs north and south, parallel to the main line tracks of the defendant company and the Southern Railway Company. At a point east of Meeting Street a spur track of the company runs from a coal yard,

crosses Meeting Street, and then runs southwestwardly toward and connects with the main line tracks of the company (for details see sketch of R. C. Rhett, reproduced in Transcript of Record opposite page 50. We believe it will serve to prevent confusion if we point out in connection with this sketch, that it is a photographic reproduction considerably reduced in size from the original, and the notation of the surveyor to the effect that the scale is 1 inch to 50 feet was merely photographed together with the sketch and does not apply to the reproduction, but to the original, and cannot be used. We are making this notation with the consent of counsel for petitioner.) Shortly before he was killed Driggers was working on an engine running on the spur track leading from the coal yard to the main line tracks of the company. The main line on the right of way with which this spur track connects runs north and south with a down grade in the southerly direction, so that the engineer on a train going south can see an engine on the spur track for a distance of at least two thousand (2,000 feet (R., 57), and before anyone on the footboard of the engine on the spur track could see his train on the main line (R., 15).

Driggers was sitting with McDonald, his conductor and yard foreman, on the back of the engine, and on approaching Etiwan was told by the foreman to cut out a car, and the conductor got out and opened the switch, throwing a red board on the track at Magnolia crossing (R., 28). After cutting out the car, Driggers

stepped up to the right hand footboard on the front of his engine (R., 28).

The engine on which Driggers was riding proceeded around a curve southward from Meeting Street road towards the southbound track of the company (R., 30), a sketch and a photograph of which appears opposite page 50 of the case. At that time tall billboards and shrubbery and bushes ten (10) or twelve (12) feet high (R., 19) were situated immediately north of the spur track on which engine No. 164 was proceeding in the angle between the spur and the main line, preventing Driggers, on the engine, from seeing a train coming south on the main line, and after an engine traveling on the curve toward the main line had passed those obstructions it had already turned so much toward the south that a man standing on the foot board in front of the engine could not see a train coming from the north on the main line (R., 41). The billboards obstructing the view between the Driggers train proceeding on the Etiwan Lead to the main track and the train coming south on the main line were there at the time Driggers was killed and were removed subsequent to that time and prior to the trial (R., 28).

As the engine approached and gained the main track, Driggers was standing in front on its right hand footboard, *facing south*, the direction *opposite* that from which train No. 79 was coming, and was looking ahead at McDonald, his conductor and yard foreman, who had dismounted sometime before and was at the time signaling to Driggers (R., 59, 30). As Driggers

stepped off his engine for the purpose of throwing a switch, getting off on the right side of the engine, which was the proper way for him to get off (R., 31), stepping between the tracks and turning to get his balance (R., 38), he was struck by train No. 79, running at a speed of *at least* fifty (50) miles an hour (R., 28) *within the yard limits* (R., 40) in a section where the instructions of the company limited the maximum speed to forty (40) miles per hour (R., 50, 55, 56), and a place which the engineer of No. 79 knew was constantly used for the purpose of shifting cars back and forth and where he had many times seen employees coming out of Etiwan Lead on shifting engines (R., 65). Despite his speed and his knowledge of the locality, Engineer Brandt proceeded without keeping a lookout and without blowing his whistle to warn the employees of his coming (R., 29), although he was behind his schedule and was not expected at the time (R., 32). If Brandt had kept a proper lookout he would certainly have seen Conductor McDonald in the open on his right when McDonald was signaling to Driggers and his attention would have been called to Driggers' position (R., 28-29).

Before approaching the main track Driggers' vision was obstructed by the shrubberies and billboards (photograph opposite page 50), and when approaching the main track his duties required him to look south in the direction in which his engine was proceeding (R., 30-31), and his engine had by that time turned almost directly toward the south and made it impossible for a

man in his position to see a train approaching from the north behind him (R., 41). If the engineer had kept a lookout on train No. 79 he could have seen engine No. 164 at a distance of at least two thousand (2,000) feet before approaching it, the telegraph operator having been able to see Conductor McDonald from his tower two thousand (2,000) feet away (R., 55, 57). It was well known that the point at which train No. 79 struck Driggers was frequently used for switching purposes, making it necessary for employees to get on and off the switch engine sometimes at intervals of five (5) or ten (10) minutes (R., 58). The exhaust of engine No. 164 prevented Driggers from hearing the blowing of a whistle at a long distance, but he could have heard it if the engineer had blown it nearer to him (R., 29). Engineer Brandt saw ahead of him the switching engine on the front of which Driggers, who was looking in the opposite direction at the conductor's signals, was riding (R., 69), and the engineer knew that members of the switching crew were likely to alight from the engine at the point where he saw it, and he also knew that a man on the switching crew could not hear a whistle blown a long distance away, because of the noise of his own engine, but could hear a whistle blown at a short distance (R., 29). He did not slacken his speed or bring his train under control. He testified that he ran his train three or four train lengths after he struck Driggers and could not stop it before, though he used the emergency brakes (R., 62). From this statement of the engineer it is obvious that

his speed was excessive, since Conductor McDonald, who was in the employ of the company at the time of the trial, testified that if Brandt had operated the train at forty (40) miles an hour, the maximum speed permitted at Southern Connection (R., 49), he would have been able to stop the same within a train length or a train length and a half (R., 29). The evidence also affirmatively shows that the train was operated at this point, which was constantly used for switching and known by the engineer to be used for such purposes (R., 65) and was within the yard limits, at a speed of *at least* fifty (50) miles an hour, although the maximum speed allowed anywhere on the main line for first class trains is fifty (50) miles (R., 48) and although the instructions issued to the employees of the company provided in heavy black-face type for "speed on all trains to be reduced when not consistent with safety" (R., 49). It is fair to assume that when a witness, who is still in the employ of the defendant company and under the eye of his superior officers, testifies that a train was traveling at a speed of "at least" fifty miles an hour, his opinion was that the train was traveling faster than fifty miles an hour and that he is stating that as the minimum of speed which he believed it was making at the time.

No signal was given to the train coming south to indicate that Driggers and his co-employees were working at that point (R., 34), although such signal had been given to trains that might be coming north (R., 28). McDonald, who had gotten off the engine some time before Driggers and who had walked fifteen

(15) or twenty (20) feet west to look for a train, saw train No. 79 coming, the view between him and the train being unobstructed (R., 40), and signaled to Driggers in such a manner as to lead Driggers to understand that McDonald was telling him that they were going to shove back to the Seaboard Air Line track and not that he was in darger of being struck by a train, there being no distinction under the rules and regulations of the company between a signal showing that a train was coming and that one was in danger of being struck by it, and a signal showing that the engine on which the receiver of the signal was standing was to be shoved back into another track (R., 29, 31), and in this instance Driggers understood that the signal indicated that they would back into the Seaboard Air Line track as he had expected they would (R., 31), and accordingly jumped from the engine to attend to the necessary switching for that operation, acting on what he took to be the conductor's signal to that effect, and as it was his duty to do.

The evidence showed that Driggers at the time of his death was twenty-eight (28) years old, earning six and 16/100 ($6.16) dollars a day, and that he left surviving a widow and two (2) children, one of which was three (3) years old at the time his father was killed and the other of which was born after Driggers' death (R., 46). The jury found for the plaintiff in the sum of twenty-five thousand ($25,000) dollars.

ARGUMENT.

For convenience we shall discuss the points raised by the petitioner in the order in which they are set out in its brief.

Point 1.

Evidence of Negligence.

There was abundant evidence in this case to show negligence on the part of the petitioner as charged, proximately causing intestate's death. We group and summarize the details of this evidence as follows:

a. The petitioner permitted the presence of billboards, shrubbery, and bushes ten (10) or twelve (12) feet high to obstruct the vision of Driggers on the switch engine and to prevent him from seeing train No. 79.

b. The engineer of train No. 79 failed to keep a proper lookout, although from his position at the top of a grade he could see the engine on which Driggers was working, and with the exercise of due care he would have seen Conductor McDonald standing on the right side of the tracks, signaling to Driggers, and would have tried to ascertain the cause of the signals Conductor McDonald was giving and would have acted accordingly.

c. The engineer of train No. 79 operated it in the yard limits in excess of fifty miles per hour, the maxi-

mum speed permitted at any point, and a speed which he knew was not consistent with safety at the place which he was approaching.

d. Although the engineer knew that the place which he was approaching was constantly used for switching, and actually saw some of the crew working there, he failed to reduce or slacken his speed while going at the rate of over fifty (50) miles per hour in and about a section known as Southern Connection, although the instructions to the petitioner's employees were that the maximum speed there should not exceed forty (40) miles per hour, and that at no time or at any place should the maximum speed exceed fifty (50) miles per hour, and that in any event the speed should be reduced when not consistent with safety.

e. Although Engineer Brandt saw or should have seen Driggers' engine, if he had kept a proper lookout, and although he knew of the presence of workers in that locality, alighting from switch engines at frequent intervals, and although he also knew that a man on a moving switch engine could not hear a whistle blown a long distance away because of the noise of his own engine, but could hear one blown nearer, he did not blow any whistle when he drew near the place so as to warn Driggers and the others of his approach, despite the additional fact that he knew he was behind his schedule and was not expected there at that time.

f. No signal was given by anyone on behalf of the petitioner to trains coming south, warning them of the

presence of engine No. 164 and the petitioner's employees at that point, although a signal or warning was given to north-bound trains approaching that locality.

g. No measures were adopted by the petitioner to safeguard Driggers and his co-employees by providing for a method of warning to Driggers and the other employees of the approach of a train at the point where they were working, cautioning them to remain on the engine until after the train had passed, with the result that the natural gestures of Conductor McDonald, unprovided with a proper signal, trying to warn Driggers to stay on the train, proved to be the signal to direct employees to get off the train to perform certain duties, and was understood by Driggers to direct him to leave the engine, which he did, instead of remaining thereon, which he would have done, if a proper signal for that purpose had been provided by the company.

h. Petitioner failed to provide proper methods of work and failed to provide competent supervision and measures to safeguard employees at a point where it required plaintiff's intestate to do his work, because it is clear from the testimony that plaintiff's intestate was killed while he was obeying the orders given him by his superior officer, including the signal which Conductor McDonald gave him and which meant to him under the system used by the petitioner, that his train was to be backed to the Seaboard Air Line track and that he was, accordingly, to jump down from his en-

gine and attend to the necessary switching for the operation; his position on the footboard in front of the engine, with his attention riveted upon the signaling conductor on the tracks ahead, precluding him from knowing anything of the approach of the fast train from behind, especially when no care was taken to blow the whistle of that train when it drew near to the engine on the front of which plaintiff's intestate was riding. It is obvious that if petitioner's employees had been provided with a proper method of signaling to warn employees to stay on a train when it was dangerous to alight, Conductor McDonald would have so signaled to Driggers, and Driggers would have stayed on the engine, and nothing would have happened to him, instead of which when McDonald, his conductor and foreman, knowing that Driggers was unaware of the approach of train No. 79 and from his position could not see it coming, instinctively used gestures in an effort to advise Driggers of the danger, he gave him the shove back signal, which virtually was an order to get off the engine.

As this Court has said in Milwaukee Railway Co. *vs.* Kellogg, 94 U. S., 469, "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it."

The facts of this case reduced to a simple form are that Driggers was riding on the footboard in front of his engine as it was traveling southwestward around a

curve; that his view of the main line tracks to the north, as to the first part of this curve, was completely obstructed by billboards and shrubbery which prevented him from seeing train No. 79 on the main line tracks; and that he was unable, after his engine had passed the billboards and shrubbery, to see the train on the main line because his engine was by then running in a direction almost directly opposite that from which train No. 79 was coming, and because he was performing his duty to keep his eyes forward upon his conductor and foreman who had alighted ahead of him and was signaling to Driggers in a manner which, under the regulations of petitioner, indicated to Driggers that the engine on which he was riding was to be shoved back and he was, therefore, expected to get off and throw the switch; so that while Driggers was not in a position to see train No. 79 at any time, a fact which was obvious to Conductor McDonald standing on the ground directing Driggers' operation, and which caused him to signal to Driggers, the engineer on train No. 79 had a straight track ahead of him and saw, or could have seen, the Driggers engine for a distance of at least two thousand feet, and there was no reason why he should not have kept a lookout for Driggers and his crew, and why he blew no whistle warning to Driggers and the others of his approach, and why he did not reduce his speed to enable him to keep his train under proper control and stop it, if necessary, before he struck Driggers or anybody else working at that point; that the engineer of the train which killed Driggers knew that switching crews fre-

quently alighted at the spot where he saw or should have seen the Driggers engine working, and if he had kept a proper lookout he would have seen Conductor McDonald on the ground giving a "shove back" signal to somebody on the Driggers engine, which would have indicated to him the probability that a trainman would alight from the work train at that point; and, in spite of these facts, the engineer continued traveling, within the yard limits, at a speed of fifty miles an hour and over, and did not blow his whistle at any point nearer than two fifths of a mile from the place where he saw the Driggers engine, which he knew was of no avail to a man riding on an engine with the exhaust sounding in his ears, but who could, however, hear a whistle blown nearer to him.

The petitioner's instructions offered in evidence show that at the Southern Connection, the tower of which was a short distance north of the place where Driggers was struck, the maximum speed limit was forty (40) miles, and yet the engineer operated his train at a speed not only in excess of that, but in excess of the maximum speed of fifty (50) miles permitted at any point on the road. We say in excess of fifty (50) miles, because there can hardly be any question from the evidence that the engineer ran his train in excess of that speed, since Conductor McDonald, an experienced railroad man in the employ of the petitioner, not only at the time when Driggers was killed, but also at the time of the trial, who tried to give the petitioner the benefit of any doubt that he might have

on the subject, because of his being still in its employ, said the speed was *at least* fifty (50) miles per hour.

We respectfully submit that petitioner's failure to furnish Driggers with a safe place to work on a track where his vision was obstructed by billboards and shrubbery, the failure of the engineer to slacken his speed, blow his whistle, keep a proper lookout, or take any precaution to keep his train under control at a place where he knew switching was going on constantly, and his failure to take such precaution in the face of the signal he could have seen Conductor McDonald giving to Driggers, together with the engineer's plain violation of the speed limit within the yards, and of the maximum speed limit permitted by the rules of the railroad, the failure of the petitioner to give any signal to trains going south, warning them of the presence of Driggers' engine at that point, and the failure of the petitioner to provide suitable methods of work and competent supervision, as evidenced by the fatal result of the signal given by its conductor, McDonald, to Driggers, were all of them acts of negligence on the part of the petitioner, and certainly were questions to be submitted to a jury to determine whether or not they constituted negligence. The questions whether or not these acts if they constituted negligence, individually or jointly and concurrently, were the proximate cause of the death of plaintiff's intestate having also presented questions of fact for the jury to determine, and the court having properly submitted these questions for the jury's determination, and the jury having resolved them in favor of plain-

tiff, we respectfully submit that this Court will not disturb that decision.

Seaboard Air Line Rwy. *v.* Padgett, 236 U. S., 668;

Seaboard Air Line Rwy. *v.* Koennecke, 239 U. S., 352;

Seaboard Air Line Rwy. *v.* Lorick, 243 U. S., 572;

Illinois Central Rwy. *v.* Skaggs, 240 U. S., 66;

Milwaukee Rwy. Co. *v.* Kellogg, 94 U. S., 69;

Great Northern Rwy. *v.* Knapp, 240 U. S., 464.

In the light of the testimony on the foregoing points, it cannot be said that there was not ample evidence from which a jury of fair-minded men, under proper instructions, could not reasonably find that the petitioner was negligent and that such negligence was, either in whole or in part, the cause of the injury to plaintiff's intestate. We quote from the language of this Court in the Skaggs case, *supra*, as follows:

> "It is contended that the State Court erred in permitting a recovery under the Federal Statute, for the reason that the injury resulted from Skaggs' own act, or from an act in which he participated. The company, it is said, 'cannot be negligent to an employee whose failure of duty and neglect produced the dangerous condition.' It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents, or employees of the employing carrier, or by reason of any

defect or insufficiency, due to its negligence, in its property or equipment, 36 Stat. at L., 65, Chap. 149, Comp. Stat. 1913, Sec. 8657. But, on the other hand, *it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury.* The inquiry must be whether there is neglect on the part of the employing carrier, and, if the *injury* to one employee *resulted 'in whole or in part'* from the negligence of *any of its other employees*, it is liable under the express terms of the act. That is, *the statute abolished the fellow-servant rule.* If the injury was due to the neglect of a co-employee, in the performance of his duty, that neglect must be attributed to the employer; and if the injured employee was himself guilty of negligence contributing to the injury, the statute expressly provides that it 'shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributed to such employee.'"

POINT 2.

No Assumption of Risk.

The trial court properly submitted to the jury the question of the assumption of risk by plaintiff's intestate, and the jury properly found from the evidence that plaintiff's intestate did not assume the risk.

It cannot be successfully urged that plaintiff's intestate assumed risks created by the negligence of the petitioner that were not obvious and apparent to him at the time, and a brief summary of the circumstances leads irresistibly to the conclusion that this was not a case in which the doctrine of assumption of risk could be applied.

We again wish to emphasize that Driggers, who was standing on the footboard in front of his engine, facing first toward the southwest, and then toward the south, during the time of the operation immediately preceding his stepping from the train, had his view of the main line tracks to the north obstructed completely during the first part of his engine's journey along the curve leading into the main line by the presence of billboards and shrubbery, which the defendant company negligently permitted to remain at the place in question, and was, from his position and the direction of his engine after it had passed into the latter phase of the curve and was headed almost due south, approaching the nearly parallel main line, prevented from seeing a train approaching from the north. Conductor McDonald testified positively that Driggers was facing south and could not see the train coming. The evidence shows that when Driggers reached a point where the billboards and shrubbery no longer obstructed his view, not only did his position and the direction of his engine prevent him from seeing a train coming from the north, but he was then and thenceforward, in the performance of his duty, looking straight ahead toward the south, the direction opposite that from which the train was coming, with his attention upon his superior officer, the conductor and yard foreman, to whom he was looking for signals, orders, and directions; and while he was so observing his conductor, as it was his duty to do, he received a signal from the conductor which, under the regulations of the petitioner and custom of railroad men, as testified to, led him to believe that he was being informed by

the conductor that his engine was to be shoved back, and that he was required then and there to leave his engine for the purpose of throwing a switch, all in the performance of his duty and in accordance with the signal and directions so received by him from his conductor. This was also at a time when, according to its schedule, train No. 79 should have already passed that point. Certainly, it cannot be successfully urged, we submit, that from the evidence the trial judge could have held, as a matter of law, that Driggers assumed the risk of being run over by a train which he could not see because of the negligent failure of the petitioner to furnish him with a safe place to work by obstructing his vision, and which he could not see because of the direction in which his own engine was traveling; such train, moreover, being negligently operated by the engineer, approaching at a terrific rate of speed, without warning to him of its approach, behind its regular schedule, at a time when his duty compelled him to look to his conductor in the direction opposite that from which the train was coming; and we respectfully submit that the court properly submitted this question to the jury, who resolved it in favor of the plaintiff.

Gila Valley, etc., R. Co. *v.* Hall, 232 U. S., 94;
Chicago, R. I. & P. R. Co. *v.* Ward, 252 U. S., 18;
Kell *v.* Rock Hill Fert. Co., 123 S. C., 199;
Yazoo & Miss. Valley R. R. Co. *v.* Wright, 235 U. S., 376;
Chesapeake & Ohio R. R. Co. *v.* Proffitt, 241 U. S., 462.

As to failure to apprehend danger when train is not running on schedule time, see:

Wrightville & T. R. Co. *v.* Gornto, 129 Ga., 204; 58 S. E., 770;

Seaboard Air Line Rwy. Co. *v.* Hollis, 20 Ga. App., 555; 93 S. E., 264.

Point 3.

The Charge on Speed.

We respectfully submit that the language used by the trial judge in connection with instructions to the jury on Specification (*b*) and Specification (*c*) of negligence charged in the complaint was neither prejudicial nor misleading to the jury, and, furthermore, that petitioner is clearly in error in the statement made in its brief to the effect that there was no evidence as to the train exceeding the fifty mile limit allowed by the rules or as to any rules limiting the speed of the train. Petitioner's instructions offered in evidence show that at the Southern Connection just above where Driggers was struck the maximum speed limit was forty (40) miles an hour, and that the maximum speed allowed on the main line for first class trains outside of yard limits was fifty (50) miles an hour, and that this train was then traveling within the yard limits; the petitioner's instructions also provided, in heavy black-face type, for "speed on all trains to be reduced when not consistent with safety." Conductor McDonald, still employed by the railroad at the time of trial, testified that the train was traveling at least fifty miles an hour at the point above referred to, which was in the

yard limits, and where switching was constantly going on, making it inconsistent with safety for any such speed to be maintained.

It is obvious, from the testimony in this case, that there was evidence to support both of the specifications complained of in this section of petitioner's brief.

As to the language used by the trial judge, conveying to the jury the information that the specifications might charge a noncompliance with the law in a general sense, we submit that a perusal of the charge as a whole will show that it was, in the language of the State Supreme Court, "eminently fair and not prejudicial." The court jealously guarded the rights of the defendants in its charge and repeatedly told the jury that it was for the jury to decide whether or not the defendants complied with the law as charged by it, and if they had not complied therewith, to decide whether or not such failure constituted negligence, and that even then the plaintiff could not recover unless such negligence was the proximate cause of the injury.

POINT 4.

Charge on Assumption of Risk.

Upon this question we submit that the trial court properly charged the jury. After telling the jury that it is the duty of the master to furnish a reasonably safe place for the servant, the court charged as follows:

> "And there is a corresponding duty on the servant. The servant has a right to assume that the master has furnished him a reasonably safe

place to work, and he does not have to make any minute inspection, or any investigation. He may assume that the master has performed his duty. *But if the place is dangerous—obviously dangerous, and can be seen by the servant, and he goes on and performs his duty after knowing that, why he assumes that risk. He takes the risk on himself, and if he is injured on account of that, he could not hold the master for that. Suppose you were employed by a railroad to work at a certain place. You would have a right to assume that the place was reasonably safe. But if the place was not reasonably safe, was dangerous, the danger was obvious to you, you could see it and knew it, and you undertook to work in that place and you got hurt, it would be your fault. Whether that happened in this case I don't know.*"

The trial court plainly told the jury, here and elsewhere, that even as to extraordinary risks, a servant could not hold the master liable if the place was obviously dangerous and he undertook to work there, and that it would be a risk which he assumed and could not recover as a result of any injuries sustained by him by reason of the assumption of such risk.

In the light of the full instructions given on this point, there was no likelihood of the jury's being misled. It is respectfully submitted that the rule that the entire charge will be taken into consideration in determining whether or not the law is properly covered is, we believe, elementary and requires little citation as a reminder that this Court has repeatedly declared

that the charge must be considered in its entirety in determining whether or not the law had been covered in the instructions to the jury. As to the refusal of the court to charge the request of petitioner in the language submitted, the law contained therein had already been covered in the main charge and there was no necessity for the court to repeat it to the jury.

Village of Evanston *v.* Gunn, 99 U. S., 660;
Baltimore & Potomac R. R. *v.* Mackey, 157 U. S., 72;
Spaulding *v.* Castro, 153 U. S., 38;
Booth *v.* White Engineering Co., 101 S. C., 483;
Hartwell *v.* Columbia Mills, 112 S. C., 177.

Respectfully submitted,

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